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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Implementation of the Cable)
Television Consumer)
Protection and Competition)
Act of 1992)
Broadcast Signal Carriage)
Issues)

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

MM Docket No. 92-259

**COMMENTS OF INTERMEDIA PARTNERS ON
REQUEST FOR DECLARATORY RULING**

InterMedia Partners, L.P. ("InterMedia"), by its attorneys, hereby submits these comments regarding the "Request for Declaratory Ruling" filed May 13, 1992 by the National Association of Broadcasters and the Association for Independent Television Stations, Inc. ("Petitioners"), to clarify certain rules adopted in the Federal Communications Commission's ("FCC" or "Commission") Report & Order, released March 29, 1993 in the above-referenced proceeding.

I. INTRODUCTION

Initially, InterMedia directs the Commission's attention to some general and procedural issues before addressing petitioners' specific complaints. First, while a Request for Declaratory Ruling is not be required to served upon the respective parties under the Commission's rules, the Request makes factual allegations involving InterMedia and other specifically named cable operators. Therefore, InterMedia strongly believes that it has the right to be heard and to respond to these unsubstantiated allegations made by petitioners. InterMedia, which was not served with a copy of the Request, is

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filing this brief response on two days' notice to preserve its right to be heard. It is respectfully submitted that the Commission should place the Request on public notice and allow interested parties at least 7 days to comment given the financial impact of the issues raised. InterMedia strongly believes that the failure to consider public comment will violate the essential fairness that must support all Commission processes.¹

InterMedia wishes to emphasize the enormous burden placed on cable operators who have been required to comply with the Commission's must-carry rules within a 30 days time period. Upon the March 29, 1993 release of the FCC's Report & Order in this proceeding, InterMedia, which operates cable systems across the United States, labored to comply, by May 3, 1993, with the following requirements: (1) conduct broadcast field strength measurements for thousands of broadcast signals at hundreds of headend sites; (2) notify, by certified mail, all commercial television stations within the Area of Dominant Influence ("ADI") and all qualified non-commercial educational stations, whether their signal measured the requisite signal strength as required under the Cable Act; (3) provide a detailed description of the methodology and results of field strength measurements to

¹ Notwithstanding the U.S. District Court's decision in Turner Broadcasting System, Inc. et al. v. F.C.C., Case No. 92-2247, issued April 8, 1993, InterMedia continues to believe that the must-carry and retransmission consent provisions of the 1992 Cable Act violate the Constitution. InterMedia anticipates that these issues will ultimately be resolved by the Supreme Court along the lines of Judge Stevens dissenting opinion in Turner.

affected broadcast stations; and (4) determine whether the carriage of such stations would result in increased copyright liability.

InterMedia conducted thousands of tests in the 30 day period allowed. Some ADIs are hundreds of square miles, and InterMedia notified stations hundreds of miles away that their signal failed to meet the statutory requirements. Many of these stations at the fringes of the ADI had never thought of themselves as must-carry stations. It is inconceivable that the Commission would not anticipate that some errors would be made, or that some confusion would result. In fact, the Report & Order adopted a regulatory scheme whereby upon notice by the cable operator that signal availability problems existed, the broadcast station and cable operator would work together to resolve technical problems. Report & Order at ¶ 97. However, 10 days after the May 3 notices were sent and without attempting to contact cable operators, petitioners have immediately rushed to the Commission alleging that operators are attempting to "obstruct the implementation process." There is nothing in the petitioners' Request or exhibits that indicates InterMedia's (or other cable operators') unwillingness to cooperate with stations to resolve these issues. The petitioners are attempting to unilaterally modify the Commission's regulatory scheme which requires these issues to be initially addressed on a case-by-case basis by the operator and affected broadcast station.

II. SIGNAL QUALITY ISSUES

As a general observation, InterMedia notes that the Report & Order provides that cable operators must take "reasonable efforts" to receive broadcast signals, and "operators are not required to take extraordinary measures to improve upon the quality of signals over which they have no control." Id. at ¶ 97, citing, Cable Technical Report & Order, 7 FCC Rcd. 2021 (1992), recon. 7 FCC Rcd. 8676 (1992) (emphasis added). The key issue is what constitutes "good engineering practices." Contrary to petitioner's assertion, the Commission's long standing and appropriate standard by which to conduct field strength measurements is set forth in § 73.686 of the Commission's rules.² Petitioners urge the Commission to do through a Declaratory Ruling what it would not do in a formal rulemaking proceeding, establish a different, higher standard than that contained in § 73.686. There is nothing in the Report & Order which indicates that the field strength testing procedures should be modified, nor have petitioners cited any such language.

While the Commission's Report & Order specifically states that cable operators are not required to take "extraordinary measures" to measure or improve broadcast signals,

² Since mobile measurements are not possible at most of InterMedia's headend sites, stationary measurements were taken using a good quality rooftop antenna elevated to a height of 20 feet above the ground. The height of 20 feet was used to simulate the height of a normal rooftop antenna. Unlike many test antennas used to measure broadcast signals which have low or little gain, InterMedia used a high gain VHF/UHF television antenna.

petitioners urge the Commission to impose exactly such a standard
upon cable operators -- a standard which would establish

(2) Measuring Equipment to be Used by Operators

Second, the petitioners request that operators should be required to "use the same antenna and receiving equipment normally used by the cable system to receive and process broadcast signals that are currently carried by the cable system." Petitioners also request that the height of the measuring antenna "be the same as that currently used by the cable system to receive broadcast signals."

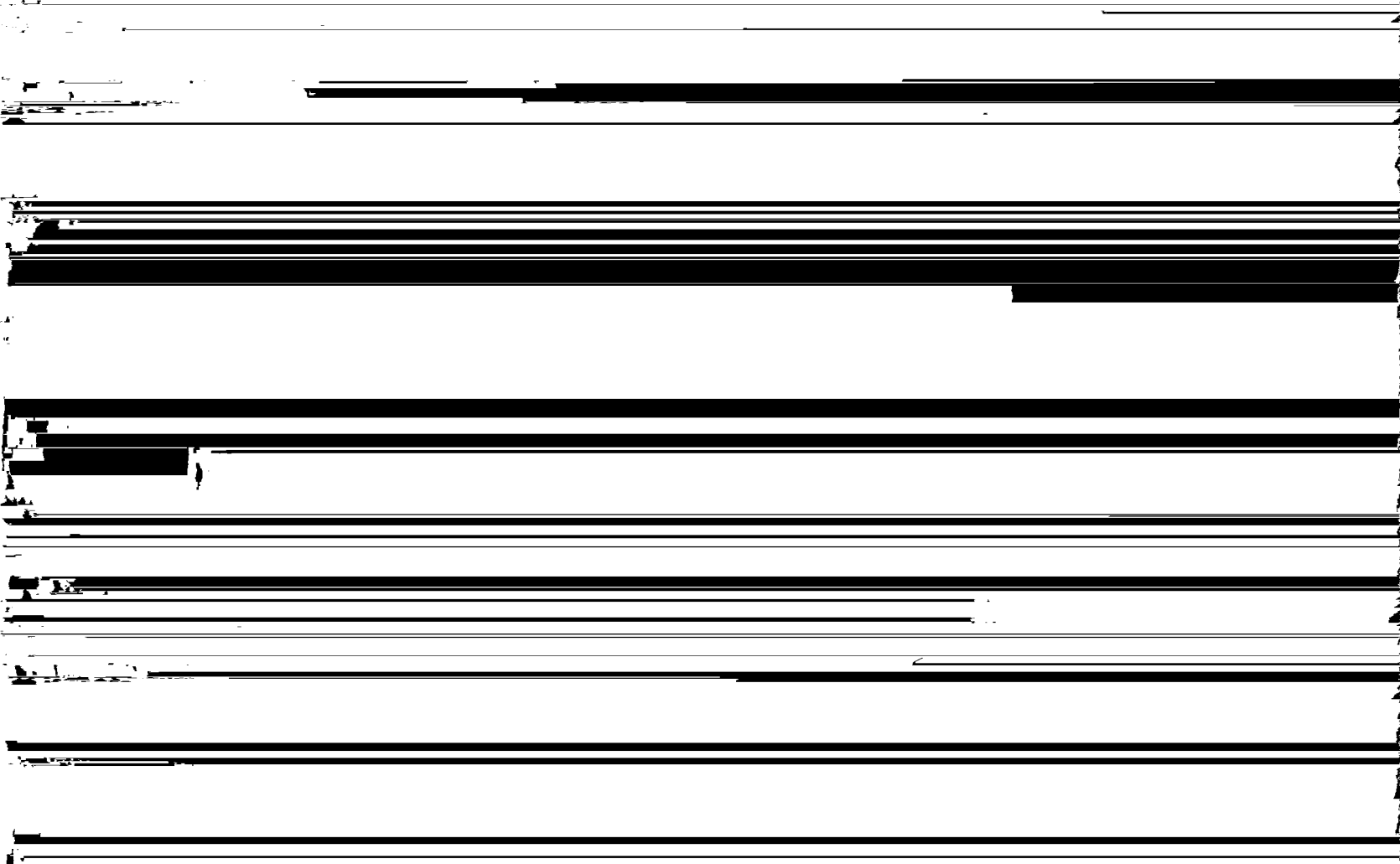
InterMedia strongly disagrees with this position. As stated above, the Commission has traditionally used free space reception by standard antennas (not specially designed for the frequency at issue) at normal roof top levels to measure the availability of broadcast signals. There is no indication in either the Report & Order or the 1992 Act that this standard should be changed. If the standard test procedures do not indicate an "available" signal, a broadcaster may choose to use a non-standard antenna for measurement purposes. If the special antenna supports must-carry, the broadcaster must then decide whether it wants to pay for the initial purchase, installation and maintenance of the antenna, and a fair share of the maintenance and any required upgrading of the supporting tower.⁵

⁵ Obviously, if a special antenna is being used by the cable operator, the broadcaster need not provide the antenna. However, in order to achieve the legal status of must-carry, it must agree to contribute to its maintenance thereafter. Generally, such costs are nominal unless microwave is involved. If it becomes necessary, through natural disaster or age, to replace the antenna and/or tower, the broadcaster should be responsible for its share of the replacement costs in order to

With respect to testing signal strength at heights above normal rooftops, InterMedia cannot permit non-employees, who are not covered by InterMedia's insurance policies, to climb its towers, some of which exceed 500 feet.

(3) Petitioners urge the Commission to require that engineers from both the cable system and broadcast station meet to resolve technical disputes, using their "best efforts." This is exactly the requirement that the Commission adopted in its Report & Order, and InterMedia agrees with this approach. The cable operator and broadcast station should be required to attempt to resolve these issues before burdening the Commission with such a dispute.⁶

(4) Petitioners urge the Commission to require operators to use high gain antennas if such an antenna would achieve adequate



to carry its signal. With respect to new antennas tuned to a broadcaster's frequency, the station should be permitted to use such an antenna to test for the presence of its signal, if it provides the antenna. However, as discussed above, InterMedia is not willing to permit non-employees to climb its towers. If the use of a specially designed antenna proves useful, the broadcaster should be responsible for any modification needed to the supporting structure to account for wind loading, etc. Many of InterMedia's towers contain microwave dishes whose performance is materially affected if the tower twists, even slightly, in the wind. Further, the broadcaster should be responsible for any costs associated with retaining a professional engineer to

Resolving all channel positioning matters in the context of the retransmission/must-carry election prior to the October deadline is the correct decision, and one which the Commission has already made.

(6) In circumstances where the television station has to provide special equipment to meet the signal quality test, petitioners urge the Commission to permit the signal to be added "when it becomes available." InterMedia does not support the notion that a station be given an unlimited period of time to fulfill its obligations. If the equipment is not made available within a ninety (90) day period, the station should lose its must-carry status for at least the remainder of the three year election period. To allow the matter to drag on indefinitely

prepared to do so, and the Commission's time and resources do not have to be wasted by the petitioners' pleas for unnecessary relief.

InterMedia, like all operators, had to make copyright assessments in a very short period of time for hundreds of systems and thousands of signals. The necessity to view must-carry status in the context of ADIs required the inclusion of some very distant stations that had never before been considered must-carry. In the copyright area the problem was even greater since, as the Commission knows, copyright liability is based on a 1970's set of must-carry rules. Petitioners' suggestion that the latest statement of accounts for the semi-annual period (1992/2)

signal compliments of the most recent statement of accounts.⁸

In no case, as petitioners suggest, can the cable operator be held liable for any additional copyright payments. Such a requirement would be directly counter to the provisions of the 1992 Act. The Commission has other remedies to deal with parties that do not obey its rules.

Finally, to illustrate just how difficult this whole issue is, petitioners assert that the operator should provide estimates for the next accounting period (July 1, 1993 - December 31, 1993) in order to assess broadcaster's potential copyright liability. It must be noted that if a signal is carried at any time during an accounting period, copyright payments are due for the whole period. If a signal is added on June 2 or even June 30, the television station would be liable for the entire first half of 1993. Petitioners appear to have overlooked this fact in their petition.

Lastly, petitioners urge the Commission to clarify that independent ownership of translators used to deliver a good quality signal is not a bar to mandatory carriage. InterMedia agrees that the issue is not ownership. However, many such translators are owned by non-profit community organizations with little resources to maintain them. The quality of the picture

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Furthermore, at this time, neither broadcasters nor

and signal is often poor and inconsistent, and the subject of numerous complaints from subscribers. For the cable operator to reserve space on its system for such service should require, at a minimum, a commitment from the television station being rebroadcast to provide the resources to the non-profit group to maintain the facility in good working order. Again, that is an issue that the parties should discuss without wasting the Commission's resources with unnecessary petitions.

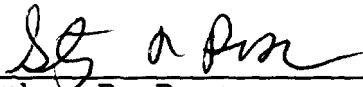
IV. CONCLUSION

InterMedia reiterates its concerns about the Commission's consideration of this Request without fulfilling the requirements of due process. In the scant time available, InterMedia has raised a number of problems with respect to petitioners' characterization of the technical and copyright-related must-carry issues. This underscores the need for further public comment. Moreover, taken literally, the position expounded by petitioners on their right to use extraordinary reception equipment purchased and maintained by cable operators would, in effect, transfer significant property rights from cable operators, as a group, to broadcasters, without just and adequate compensation. At a minimum, public notice of the Request allowing parties seven days to comment is reasonable.

Based on the foregoing, InterMedia Partners respectfully requests that the Commission consider the issues and concerns raised herein.

Respectfully submitted,
INTERMEDIA PARTNERS

By:



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Dated: May 18, 1993

CERTIFICATE OF SERVICE

I, Magdalene E. Copp, a secretary of the law office of Ross & Hardies, do hereby certify that I have this 18th day of May, 1993, served by first-class mail, postage pre-paid or hand delivery, a copy of the foregoing "Response of InterMedia Partners to Request for Declaratory Ruling" to:

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By: Magdalene E. Copp
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* Delivered by hand